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SUPREME COURT OF THE UNITED STATES  
October Term, 1976

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SUPREME COURT, U.S.

No. 75-6905

ORIGINAL COPY

ARCHIE ALLEN, Petitioner

versus

THE STATE OF SOUTH CAROLINA, Respondent

for RSP  
BRIEF IN OPPOSITION TO PETITION FOR  
WRIT OF CERTIORARI

DANIEL R. McLEOD  
Attorney General

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ARCHIE ALLEN, Petitioner,

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OPINION BELOW

The opinion of the Supreme Court of the State of South Carolina is reported at \_\_\_ S. C. \_\_\_, 222 S.E. 2d 287 (1976) and is set out as Appendix A.

JURISDICTION

Respondent does not question the Court's jurisdiction in this proceeding.

QUESTION PRESENTED

Whether the imposition and carrying out of the sentence of death for the crime of first degree murder under the Laws of South Carolina violates the Eighth or Fourteenth Amendment to the Constitution of the United States?

ARGUMENT

I.

The State of South Carolina, in opposition to the Petition for a Writ of Certiorari in this matter, respectfully submits the following:

Petitioner's submitted reasons for allowance of a Writ of Certiorari are without merit.

Petitioner contends that this Court should grant Certiorari solely to consider whether the imposition and carrying out of his sentence of death for the crime of murder of a law enforcement officer while acting in the line of duty, pursuant to Section 16-52, Code of Laws of South Carolina, 1962, as amended (1975 Supp.), violates the Eighth or Fourteenth Amendment to the Constitution of the

United States. As grounds for his contention, Petitioner alleges that the perpetuation of prosecutorial charging discretion, plea bargaining, jury discretion to return a verdict of guilty to a lesser offense and executive clemency under the new South Carolina capital punishment statutory system renders his sentence of death under that system excessively cruel.

Respondent would initially submit that these enumerated issues have been resolved by this Court contrary to Petitioner's position in Gragg v. Georgia, 19 Cr. L. 3250 (filed July 2, 1976). It is therefore contended that Petitioner sets forth no valid reasons meriting consideration by this Court on a Writ of Certiorari.

II.

The sole question presented by Petitioner in his prayer for a Writ of Certiorari has been rendered moot.

In State v. Floyd William Ramsey, Op. No. 20263 (filed July 21, 1976, and set out as Appendix B hereto) the South Carolina Supreme Court had occasion to review Section 16-52 in light of this Court's opinions in Woodson v. North Carolina and Roberts v. Louisiana, *infra*. In that opinion, the Court unequivocally held that:

"...the United States Supreme Court decisions of July 2, 1976 with respect to the mandatory death penalty statutes of North Carolina and Louisiana, viz., Woodson v. North Carolina, \_\_\_ U.S. \_\_\_, 19 Cr. L. 3287 (1976); and Roberts v. Louisiana, \_\_\_ U.S. \_\_\_, 19 Cr. L. 3301 (1976), made it clear to us that mandatory death sentences in specified circumstances which leave neither judge nor jury discretion to impose a lesser sentence violate the Eighth Amendment prohibition against cruel and unusual punishment."

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"As our statute does not permit the exercise of controlled discretion in imposing the death penalty required by the recent decisions, but mandates a death sentence upon a finding of murder committed in the circumstances specified in Section 16-52, it too is Constitutionally defective."

Respondent thus respectfully submits that Ramsey, *supra*, declaring the mandatory death penalty provision of Section 16-52 in violation of the Eighth Amendment prohibition against cruel and unusual punishment, renders the question presented by Petitioner entirely moot.

CONCLUSION

For the foregoing reasons, Respondent submits that Petitioner's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

DANIEL R. McLEOD  
Attorney General

JOSEPH C. COLEMAN  
Deputy Attorney General

JOSEPH R. BARKER  
Assistant Attorney General

The STATE, Respondent,

v.

Archie ALLEN, Appellant.

No. 20167.

Supreme Court of South Carolina.

Feb. 11, 1975.

Defendant was convicted before the General Sessions Court, Horry County, Clarence E. Singletary, Jr., of murder of a law enforcement officer, and defendant appealed. The Supreme Court, Moss, Acting Associate Justice, held that denial of motion for change of venue on basis of pretrial publicity was not an abuse of discretion, that denial of motion for severance and separate trials was not an abuse of discretion, that evidence was sufficient to sustain conviction, that statute, which requires imposition of death penalty under certain circumstances wherein one is found guilty of murder, is not legislation unconstitutionally vesting trial court or jury with discretion in imposing death penalty, and that capital punishment does not violate federal constitutional prohibition against cruel and unusual punishment or state constitutional prohibition against cruel, corporal or unusual punishment.

Affirmed.

1. Criminal Law — 126(2)

Denial of motion for change of venue on basis of pretrial publicity was not an abuse of discretion in prosecution for murder.

during a game warden where the newspaper and magazine articles in question were factual in nature and were not inflammatory or accusatory toward defendant.

2. Criminal Law — 622(1), 1145

Generally, whether to grant motion for severance and separate trials is addressed to discretion of trial judge, and, unless that discretion is abused, his decision will not be disturbed on appeal; such rule applies with equal force when the motion is based on antagonistic defenses.

3. Criminal Law — 622(2)

Denial of motion for severance and separate trials on ground of antagonistic defenses was not an abuse of discretion in murder prosecution in which defendant testified that codefendant shot two game wardens and in which codefendant testified that defendant instigated the trouble and shot one of the wardens.

4. Criminal Law — 915(1)

Whether to grant motion to set aside verdict or, in alternative, grant new trial due to alleged insufficiency of the evidence is addressed to sound discretion of trial court.

5. Criminal Law — 915(1)

In ruling on motions to set aside verdict or, in alternative, grant new trial on basis of alleged insufficiency of the evidence, trial court is concerned with the existence of evidence, not with its weight.

6. Homicide — 250

Evidence, including game warden's testimony that he heard a second warden ask accused not to shoot such warden and that first warden subsequently heard a blast and saw second warden fall, was sufficient to sustain conviction of murder of law enforcement officer.

7. Homicide — 351

Statute, which requires imposition of death penalty under certain circumstances wherein one is found guilty of murder, is

not legislation unconstitutionally vesting trial court or jury with discretion in imposing death penalty. Code 1962, § 16-52.

8. Criminal Law — 1213

Capital punishment does not violate federal constitutional prohibition against cruel and unusual punishment. Code 1962, § 16-52; U.S.C.A. Const. Amendment, 5, 3, 14.

9. Criminal Law — 1213

Capital punishment does not violate state constitutional prohibition against cruel, corporal or unusual punishment. Code 1962, § 16-52; Const. art. 1, § 15.

Franklin R. DeWitt, Conway, and Matthew J. Perry, Columbia, for appellant.

Atty. Gen. Daniel R. McLeod and Asst. Atty. Gen. Joseph R. Barker, Columbia, Sol. J. M. Long, Jr., and Asst. Sol. Jim Dunn, Conway, for respondent.

MOSS, Acting Associate Justice:

Archie Allen, the Appellant, was tried in Horry County before the Honorable Clarence E. Singletary on the charge of murdering one Charles McNeill, a South Carolina Game Warden. The jury returned a verdict of guilty of the murder of a law enforcement officer and the Appellant was sentenced, pursuant to Section 16-52 of the 1962 Code of Laws, to death.

The Appellant contends before this Court that he is entitled to a reversal of his conviction and a new trial. Specifically, he assigns error to the conduct of the trial court in three particulars:

(1) In refusing to grant Appellant's motion for a change of venue;

(2) In refusing to grant Appellant's motion for severance and separate trials; and

(3) In refusing to grant Appellant's motion to set aside the verdict or, in the alternative, for a new trial.

The Appellant also urges that his death sentence must be set aside because of what

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he perceives to be constitutional infirmities in Section 16-52.

Appellant's arguments will be considered in detail below. Initially, however, a review of the facts is necessary to an understanding of the issues.

On October 3, 1974, the Appellant, his brother, Cleve Allen, and a friend Sam Todd, were engaged in a deer drive in a rural area of Horry County. At about 11:00 A.M., South Carolina Game Wardens Charles McNeill and Floyd Benton, who were patrolling the area as part of their routine duties, met and conversed for some thirty to forty minutes with the Appellant and his companions.

That afternoon, McNeill and Benton returned to the same area and discovered that a cable, which they had previously placed across the road to keep people out of a nearby game management area, was down. They observed that a vehicle had entered the management area and proceeded to follow it. The vehicle was occupied by Cleve Allen and Sam Todd. The Wardens stopped the vehicle at approximately 2:30 P.M. and Officer McNeill issued both men a ticket. Todd and Allen, followed by the two Wardens, then drove back to the area where the cable was down.

When McNeill and Benton arrived at the cable, the Allen brothers and Todd, their vehicles parked nearby, were still present. The Wardens discovered that the cable was broken and set about repairing it.

Up to this point, the testimony of the four surviving participants of this incident was generally in agreement. Their versions of the subsequent events were, however, widely divergent. The Appellant and his brother, Cleve Allen, testified that Sam Todd shot both Wardens. Todd testified that the Appellant instigated the trouble and shot McNeill. Todd admitted that he shot Benton.

Floyd Benton testified that McNeill stopped their car near the cable and that he took off his coat and gun and began getting the tools to repair the cable. While he was

in the process of getting the tools from the trunk of his car, he observed the Appellant take his gun and walk toward the front of his truck. A few seconds later, Benton heard McNeill say, "Don't shoot me, Arch, don't shoot me." Benton saw McNeill standing a few feet away but could not, due to the positions of the vehicles, see the Appellant. Looking around, Benton observed Cleve Allen and Sam Todd sitting in Cleve's truck. He testified that he called to Cleve in an effort to get the latter to restrain his brother. Benton then heard a blast and saw McNeill fall. He testified that the blast came from the direction in which the Appellant was heading when Benton had last seen him.

Benton further testified that he heard an unidentified voice say, "well, there ain't but one thing to do now and that's kill the last damn one of these sons of bitches." Benton turned to find Sam Todd aiming his shot gun at him. Todd then shot Benton down, seriously wounding him. The three men then drove off.

(1) Immediately prior to trial, Appellant moved for a change of venue on grounds that extensive pre-trial publicity had prejudiced his right to a fair trial. After hearing oral argument and reviewing some six newspaper and magazine articles tendered by the Appellant, Judge Singletary denied the motion. Appellant contends that denial constitutes reversible error.

In *State v. Swilling*, 249 S.C. 341, 155 S.E.2d 607, this Court held that the moving party has the burden of showing that prospective jurors have been prejudiced by pre-trial publicity. Further, we have held that the decision of the trial judge on motions of this nature will not be disturbed in the absence of a showing of abuse of discretion. *State v. Fuller*, 227 S.C. 125, 37 S.E.2d 237.

A review of the record fails to reveal that the trial judge abused his discretion in the instant case.

Appellant's showing in support of his motion was insufficient to carry his burden of

establishing that prospective jurors had been prejudiced by the pre-trial publicity. That showing, as noted above, was limited to some six newspaper and magazine articles. None of those articles were inflammatory or accusatory toward the Appellant and none appeared to be anything but factual in nature.

Furthermore, the trial court followed the procedure approved of in our decision in *State v. Crowe*, 253 S.C. 258, 188 S.E.2d 379, cert. den., 409 U.S. 1077, 93 S.Ct. 691, 34 L.Ed.2d 666, in that he conducted a careful voir dire examination of the jurors to determine the existence of any bias or prejudice on their part. The record indicates, in fact, that the trial court propounded every one of the voir dire questions requested by the Appellant.

The second issue raised by the Appellant concerns the denial of his motion for severance and separate trials. That motion, made some two days prior to trial, was based upon an allegation that the defenses of the Appellant and his co-defendant, Sam Todd, were antagonistic to each other and that the Appellant would be prejudiced if they were tried together.

(2) Generally speaking, as noted by this Court on numerous occasions, the granting or denial of a motion for severance and separate trials is addressed to the discretion of the trial judge. Unless that discretion is abused, his decision will not be disturbed on appeal. *State v. Holland*, 261 S.C. 458, 201 S.E.2d 118, and see cases collected under *§ 622(1)*, and *§ 622(2)*, West's South Carolina Digest, Criminal Law.

The general rule applies with equal force when, as in the instant case, the motion is based upon antagonistic defenses. *State v. Britt*, 235 S.C. 395, 111 S.E.2d 669.

(3) Clearly, the trial court acted properly within the bounds of its discretion. The facts in *Britt*, *supra*, are strikingly similar. In that case, three men were on trial for the murder of a South Carolina Highway Patrolman. As in the instant case, there

was a dispute among the defendants as to who fired the fatal shot. Two of the defendants moved for severance and separate trials on the grounds of antagonistic defenses. They both denied having fired the fatal shot and one, corroborated by the third defendant, averred that the other did the shooting. The trial court denied the motion and this Court affirmed citing as authority five previous cases in which denials of motions for severance based upon antagonistic defenses had been upheld. *State v. Brown*, 168 S.C. 490, 95 S.E. 61; *State v. Jeffords*, 121 S.C. 443, 114 S.E. 415; *State v. Franks*, 152 S.C. 17, 149 S.E. 345; *State v. Atkins*, 205 S.C. 450, 32 S.E.2d 372; *State v. Mathis*, 174 S.C. 344, 177 S.E. 318.

Appellant advances no reason why these decisions are not controlling and this Court is aware of none. There is no basis for a reversal on this point.

The third issue raised by the Appellant concerns the trial court's denial of his motion to set aside the verdict or, in the alternative, for a new trial. The motion was based upon alleged insufficiency of the evidence.

(4, 5) The granting or denial of such motions is addressed to the sound discretion of the trial court. *State v. Quillian*, 263 S.C. 87, 207 S.E.2d 814. Furthermore, in ruling on motions of this nature, the trial court is concerned with the existence of evidence—not with its weight. *State v. Addis*, 257 S.C. 482, 186 S.E.2d 413; *State v. Jordan*, 255 S.C. 56, 177 S.E.2d 464.

(6) Under the facts of the instant case, as reviewed above, the trial court acted properly within its discretion in submitting the factual issues to the jury. Undeniably, there were both direct and circumstantial evidence which reasonably tended to establish the Appellant's guilt. Indeed, the testimony of Floyd Benton alone was sufficient to warrant sending the case to the jury.

The fourth and final issue raised by the Appellant concerns the constitutionality of Section 16-52 of the 1962 Code of Laws.

The Appellant launches three attacks on the constitutionality of this Section. He argues:

(1) That Section 16-32 is unconstitutional under the United States Supreme Court decision in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346;

(2) That capital punishment is "cruel and unusual punishment" and is therefore unconstitutional *per se* under the Eighth Amendment to the United States Constitution; and

(3) That capital punishment is "cruel, corporal, or unusual punishment" and is therefore unconstitutional *per se* under Article 1, Section 15 of the South Carolina Constitution.

Although these issues were neither raised before, nor ruled on by, the trial court, this Court has, *in favorem vitae* considered the Appellant's arguments thereon. *State v. Swilling*, 249 S.C. 541, 153 S.E.2d 607. We find them to be without merit. They will be discussed *seriatim*.

[7] Appellant contends that Section 16-32 is unconstitutional under the *Furman* decision because imposition of the death penalty pursuant to that section is discretionary and therefore cruel and unusual punishment under the Eighth Amendment to the United States Constitution. He specifically attacks the discretion of the jury, the Solicitor's charging discretion, the Solicitor's plea negotiation discretion, and the Governor's discretion in granting or withholding executive clemency.

The Legislature of this State, in amending Section 16-32, apparently made a conscious, deliberate effort to comply with the mandate of *Furman*. We think that effort was successful.

Although *Furman* is not subject to facile interpretation, both the majority and minority justices of that decision concur that the decision did no more than condemn legislation which vested the trial court or jury with discretion in imposing the death penalty (See Justice Marshall's dissent, joined by

Justices Douglas and Brennan in *Schick v. Reed*, 419 U.S. 256, 95 S.Ct. 379, 42 L.Ed.2d 420, and see the separate dissenting opinions, in *Furman*, of Chief Justice Burger, 408 U.S. 375-376, 398, 92 S.Ct. 2796-2797, 2808, 33 L.Ed.2d 427-428, 441; Justice Blackmun, 408 U.S. 413, 92 S.Ct. 2816, 33 L.Ed.2d 450; and Justice Powell, 408 U.S. 415-418, 92 S.Ct. 2816-2818, 33 L.Ed.2d 451-453).

Section 16-32 allows no such discretion to the trial judge and jury. The statute provides certain specific, narrow, well delineated circumstances in which one who is found guilty of murder must suffer the penalty of death. In compliance with *Furman*, neither the trial judge nor jury is given any discretion in the matter.

Appellant's contentions concerning the discretion of the Solicitors and the Governor are clearly without merit. *Furman* cannot reasonably be read to extend beyond the trial judge and jury or beyond the sentencing state of the proceedings. Section 16-32 has removed the discretion condemned by *Furman*; it is therefore in compliance with that decision.

[8] Appellant's next contention is that capital punishment constitutes "cruel and unusual punishment" and is therefore unconstitutional *per se* under the Eighth Amendment to the United States Constitution.

The decisions of the United States Supreme Court lend absolutely no support to the Appellant's contention. On the contrary, prior to *Furman*, the Court either expressly or implicitly upheld the constitutionality of capital punishment on numerous occasions. *Wilkinson v. Utah*, 99 U.S. 130, 25 L.Ed. 345 (1879); *In Re Kemmler*, 135 U.S. 476, 10 S.Ct. 930, 34 L.Ed. 319 (1890); *Weems v. United States*, 217 U.S. 349, 30 S.Ct. 344, 54 L.Ed. 703 (1910); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 67 S.Ct. 374, 91 L.Ed. 422 (1946); *Trop v. Dulles*, 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630 (1955); *Witherspoon v. Illinois*,

391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968); *McGautha v. California*, 402 U.S. 183, 91 S.Ct. 1484, 29 L.Ed.2d 711 (1971).

Furthermore, as this Court noted in *State v. Speights*, 263 S.C. 127, 134, 208 S.E.2d 43, *Furman* itself cannot be read to declare capital punishment unconstitutional *per se*.

Under the foregoing decisions and under any constitutionally sound interpretation of the Fifth, Eighth, and Fourteenth Amendments, it is clear that capital punishment does not violate the prohibition against cruel and unusual punishment.

[9] Appellant's final contention is that capital punishment constitutes "cruel, corporal, or unusual punishment" and is therefore unconstitutional *per se* under Article 1, Section 15 of the South Carolina Constitution.

This Court considered this issue on no less than four occasions under Article 1, Section 19, the predecessor provision of Article 1, Section 15. On each occasion, the constitutionality of capital punishment was upheld. *State v. Crowe*, 253 S.C. 258, 153 S.E.2d 379; *State v. Atkinson*, 253 S.C. 531, 172 S.E.2d 111; *State v. Gamble*, 249 S.C. 605, 153 S.E.2d 916; and *Moorer v. MacDougall*, 245 S.C. 633, 142 S.E.2d 46.

The Appellant relies heavily upon the fact that the language of Article 1, Section 15 differs from that of Article 1, Section 19.

The former provision used the words "cruel and unusual punishment." He urges that the specific language of Article 1, Section 15 compels the conclusion that continued imposition of the death penalty is inconsistent with this new provision. We disagree.

The reasoning upon which the foregoing decisions were based is as directly applicable to Article 1, Section 15 as it was to Article 1, Section 19. See *Crowe*, 253 S.C. at 271, 153 S.E.2d at 335. We adhere to those decisions.

As is our custom in cases of this nature, we have, *in favorem vitae*, carefully examined the record for any errors affecting the substantial rights of the accused, even though not made a ground of appeal. We find none. Having concluded that the evidence was sufficient to sustain the verdict, and finding no errors of law in the trial, we are not warranted in disturbing the verdict and sentence imposed.

Affirmed.

LEWIS, C. J., and LITTLEJOHN, NESS and GREGORY, JJ., concur.



THE STATE OF SOUTH CAROLINA  
In The Supreme Court

The State, . . . . . Respondent,  
v.  
Floyd William Rumsey, . . . . . Appellant.

Appeal From Greenville County  
Frank Eppes, Judge

Opinion No. 20263  
Filed July 21, 1976

AFFIRMED IN PART; and  
REMANDED IN PART

William I. Bouton, of Greenville, for appellant.

Attorney General Daniel R. McLeod and Assistant Attorneys  
General Joseph R. Barker and Brian P. Gibbs, all of Columbia;  
and Solicitor William W. Wilkins, of Greenville, for respondent.

PER CURIAM: Appellant was convicted of murder while committing an armed robbery and sentenced to death pursuant to Section 16-52, 1962 South Carolina Code of Laws as amended. He appeals raising numerous grounds for a new trial.

Oral argument was had at the June term of this Court. One of the grounds urged for reversal was the unconstitutionality of the death penalty.

Prior to a final decision by this Court on the merits of the appeal, the United States Supreme Court decisions of July 2, 1976 with respect to the mandatory death penalty statutes of North Carolina and Louisiana, viz., Woodson v. North Carolina, \_\_\_ U. S. \_\_\_, 19 Cr. L. 3287 (1976); and Roberts v. Louisiana, \_\_\_ U. S. \_\_\_, 19 Cr. L. 3301 (1976), made it clear to us that mandatory death sentences in specified circumstances which leave neither judge nor jury discretion to impose a lesser sentence violate the Eighth Amendment prohibition against cruel and unusual punishment.

Since Section 16-52 imposes a mandatory death penalty upon a finding of murder committed in specified circumstances, this Court requested counsel for Appellant to re-argue the constitutionality of Section 16-52 in light of the aforementioned United States Supreme Court decisions.

On re-argument, counsel for Appellant abandoned all exceptions seeking a new trial and limited relief sought to a remand to the lower court for imposition of a life sentence. In essence, Appellant now seeks affirmance of his conviction but vacation of his death sentence. (Both prior to and at trial, Appellant sought to plead guilty to common-law murder which carries a life sentence.)

Notwithstanding Appellant's abandonment at re-argument of issues raised pertaining to a new trial, we reviewed the record for all possible error. We find no merit in any ground raised with the exception of the constitutionality of the mandatory death penalty provisions of Section 16-52, re-argued in light of Woodson, supra.

The United States Supreme Court in Woodson found North Carolina's death penalty statute [similar to ours] unconstitutional on three grounds. First, it is proscribed by the Eighth and Fourteenth Amendment's requirement that the State's power to punish be exercised within the limits of civilized standards. Woodson, 19 Cr. L. 3289 (1976). The Court concluded that automatic death penalties have historically been rejected by juries and legislatures and that their imposition today departs unacceptably from contemporary, societal standards regarding the imposition of death. The Court ascribed the enactment of mandatory death penalties after Furman v. Georgia, 408 U. S. 238, 33 L. Ed. (2d) 346, 92 S. Ct. 2726 (1976) to attempts by the States to retain constitutional death penalties rather than to a reversal of societal values towards acceptance of mandatory death sentencing. (The amendment

THE STATE v. RUMSEY

of South Carolina's death penalty statute in 1974 imposing mandatory death sentences for specified offenses resulted from our legislature's efforts to cure the constitutional defect of the jury's unbridled discretion to impose the death penalty condemned in Furman.)

Secondly, the Court found that the mandatory death penalty contains the same basic, underlying defect of unguided, unchecked jury discretion condemned in Furman. Woodson, 19 Cr. L. 3294 (1976). Although the Furman court dealt with unbridled jury discretion, the Woodson court points out that no discretion at all in imposing the death penalty is equally constitutionally repugnant. The Court calls for "objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death." Woodson, 19 Cr. L. 3294 (1976).

Thirdly, the mandatory death penalty fails "to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." Woodson, 19 Cr. L. 3294 (1976). The Court explained further:

"[W]e believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment, See Trop v. Dulles, 356 U. S. at 100 (plurality opinion) requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." at 3295.

As our statute does not permit the exercise of controlled discretion in imposing the death penalty required by the recent decisions, but mandates a death sentence upon a finding of murder committed in the circumstances specified in Section 16-52, it too is constitutionally defective.

As the mandatory death provisions under the aggravated circumstances enumerated in Section 16-52 are unconstitutional, in line with the procedure permitted in Furman and used in State v. Gibson, 259 S. C. 459, 192 S. E. (2d) 720 (1972), we affirm appellant's conviction of murder and reverse only imposition of the death penalty, leaving him subject to the constitutional life sentence provision of Section 16-52. Accordingly, the case is remanded to the General Sessions Court of Greenville County for the purpose of sentencing the appellant to life imprisonment.

Affirmed in part and reversed in part.

s/ J. Woodrow Lewis C. J.  
s/ Bruce Littlejohn A. J.  
s/ Wm. L. Rhodes, Jr. A. J.  
s/ George T. Gregory, Jr. A. J.  
s/ John Grimball A. A. J.